

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	File Number EB-05-TP-330
Ben Metzger dba 1 Stop Communications / 1 Stop)	
CB Shop)	NAL/Acct. No. 200732700004
)	
Titusville, Florida)	FRN 0015839350

FORFEITURE ORDER

Adopted: February 28, 2007

Released: March 2, 2007

By the Regional Director, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of seven thousand dollars (\$7,000) to Ben Metzger dba 1 Stop Communications / 1 Stop CB Shop in Titusville, Florida for willful and repeated violation of Section 302(b) of the Communications Act of 1934, as amended (“*Act*”),¹ and Section 2.803(a) of the Commission’s Rules (“*Rules*”).² The noted violation involves Mr. Metzger’s offering for sale non-certified Citizens Band (“*CB*”) transceivers.³

II. BACKGROUND

2. On March 21, 2006, the Commission’s Tampa Office of the Enforcement Bureau (“*Tampa Office*”) issued Mr. Metzger / 1 Stop Communications / 1 Stop CB Shop a Citation for marketing at his store in Titusville non-certified CB transceivers, including Connex models 3300, CX 3300HP, CX 4400HP and Galaxy models DX44 and DX88HL, in violation of Section 302(b) of the Act and Section 2.803(a)(1) of the Rules.

3. In a response dated March 31, 2006, Mr. Metzger stated that the radio models listed in the Citation were Amateur Radio Service (“*ARS*”) radios, which do not require type acceptance. On May 11, 2006, the Tampa Office responded that the models were intended for use on CB as well as ARS frequencies because they have built-in design features which facilitate their operation on CB frequencies by the exercise of simple, end-user accessible modifications to the devices. Accordingly, the letter advised, such devices are considered CB transmitters pursuant to Section 95.603(c) of the Rules,⁴ irrespective of any labeling purporting the devices to be “*Amateur Radio Transceivers*.”

4. In a response dated May 16, 2006, Mr. Metzger stated he removed the Connex and Galaxy radios mentioned in the Citation from his store, the 1 Stop CB Shop. On June 6, 2006, the Tampa Office received a letter from his attorney, which requested that the Citation be withdrawn, because the

¹ 47 U.S.C. § 302a(b).

² 47 C.F.R. § 2.803(a).

³ CB radio operation is confined to forty specified channels from 26.965 MHz to 27.405 MHz (carrier frequency).

⁴ 47 C.F.R. § 95.603(c).

radios were marketed and sold as ARS radios, not CB radios. The Citation was not withdrawn.

5. On June 22, 2006, agents from the Tampa Office revisited the 1 Stop CB Shop in Titusville and observed a “40 Channel” Connex CX 3300HP amateur transceiver along with other uncertified radios in the display case. The Commission’s Office of Engineering and Technology (“OET”) previously tested Connex models very similar to the CX 3300HP and determined them to be non-certified CB transceivers because they could be easily modified to operate on CB frequencies. The agents inquired whether this particular Connex could operate on both CB channels and amateur bands. Mr. Metzger stated that there were easy directions on the Internet which show how to modify the radio to operate on CB frequencies. He also stated that he could easily modify the radio to operate on the CB channels for a small “tune-up” charge. The agents paid him for the radio and the “tune-up.” Mr. Metzger handed them the modified Connex CX 3300HP transceiver about 15-20 minutes later and then demonstrated how to use the different toggle switches on the radio to switch from the amateur band to the different CB channels. The agents later determined that the modified Connex radio purchased from the 1 Stop CB Shop was capable of operating on frequencies from 25.615 MHz to 28.305 MHz with an output power that varied from 2.4 watts to 15 watts.

6. On December 12, 2006, the Tampa Office issued a *Notice of Apparent Liability for Forfeiture* to Mr. Metzger in the amount of seven thousand dollars (\$7,000) for the apparent willful and repeated violation of Section 302(b) of the Act and Section 2.803(a) of the Rules.⁵ Mr. Metzger submitted a response to the *NAL* requesting cancellation of the proposed forfeiture.

III. DISCUSSION

7. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,⁶ Section 1.80 of the Rules,⁷ and *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), recon. denied, 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”). In examining Mr. Metzger’s response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁸

8. Section 302(b) of the Act provides that “[n]o person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.”⁹ Section 2.803(a) of the Rules provides that: “Except as provided elsewhere in this section, no person shall sell or lease, or offer for sale or lease (including advertising for sale or lease), or import, ship, or distribute for the purpose of selling or leasing or offering for sale or lease, any radio frequency device ... unless such device has been authorized by the Commission.”¹⁰

⁵ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200732700004 (Enf. Bur., Tampa Office, December 12, 2006) (“*NAL*”).

⁶ 47 U.S.C. § 503(b).

⁷ 47 C.F.R. § 1.80.

⁸ 47 U.S.C. § 503(b)(2)(D).

⁹ 47 U.S.C. § 302a(b).

¹⁰ 47 C.F.R. § 2.803(a).

9. CB radio transceivers are subject to the equipment authorization procedure known as Certification and must be certified and properly labeled prior to being marketed or sold in the United States.¹¹ Unlike CB radio transceivers, radio transmitting equipment that transmits solely on Amateur Radio Service (“ARS”) frequencies is not subject to equipment authorization requirements prior to manufacture or marketing. However, some radio transmitters that transmit in a portion of the 10-meter band of the ARS (28.000 to 29.700 MHz), just above the CB band (26.965 to 27.405 MHz), are equipped with rotary, toggle, or pushbutton switches mounted externally on the unit, which allow operation in the CB bands after completion of minor and trivial internal modifications to the equipment. In an order, the Commission adopted changes to its Rules regarding the CB type acceptance requirements by defining a “CB Transmitter” as “a transmitter that operates or is intended to operate at a station authorized in the CB.”¹² Section 95.655(a) of the Rules also states that no transmitter will be certificated for use in the CB service if it is equipped with a frequency capability not listed in Section 95.625 of the Rules (CB transmitter channel frequencies).¹³ OET has clarified that ARS transceivers designed “such that they can easily be modified by the users to extend the operating frequency range into the frequency bands” of the CB are CB transmitters, because they are intended to operate on the CB bands.¹⁴

10. Mr. Metzger states that he sold the agents a Connex CX 3300HP ARS radio, which does not require FCC certification. He provided test results that state the radio as manufactured operates only on ARS frequencies. He claims if he modified the radio to operate on CB frequencies after selling it, a point which he does not concede, such action does not violate the Rules. Mr. Metzger does not agree that he sold the agents a non-certified CB transceiver and claims the Commission cannot change its rules through changes in policy. Mr. Metzger also claims that the Commission has not explained what an easily modifiable ARS radio is, that almost all ARS radios can be modified to operate on CB frequencies, and that it violates due process to fine it for this violation.

11. As described in detail above, the Commission adopted Rules determining that the definition of “CB transmitter” in Section 95.603(c) of the Rules includes radios “intended to operate at a station authorized in the CB.” OET and the Office of General Counsel for the Commission (“OGC”) have clarified that this definition includes ARS radios that can be easily modified to operate on CB frequencies. OGC has stated that transmitters that “have a built-in capability to operate on CB frequencies and can easily be altered to activate that capability, such as by moving or removing a jumper plug or cutting a single wire” fall within the definition of “CB transmitter.”¹⁵ Section 95.603 of the Rules states that all CB transmitters must be certificated.¹⁶ Thus, the Commission did not change its Rules merely by “making a policy change” as Mr. Metzger alleges, and it does not violate due process to enforce these Rules. Moreover, it is irrelevant whether it might be legal or illegal to sell other models of non-certified ARS radios.

¹¹ See 47 C.F.R. §§ 2.907, 2.927(a).

¹² 47 C.F.R. § 95.603(c) [FCC 88-256], amended changing “type acceptance” to “certification” [FCC 98-58]. See also *Extended Coverage High Frequency Transceivers*, Public Notice 62882, 1996 WL 242469, available at <<http://www.fcc.gov/Bureaus/Engineering_Technology/Public_Notices/1996/pnet6023.txt>> (OET, rel. May 13, 1996) (“Public Notice”).

¹³ 47 C.F.R. § 95.655(a).

¹⁴ See *Public Notice*. See also Letter from Christopher Wright, General Counsel, FCC to John Atwood, Chief Intellectual Property Rights, US Customs Service, 14 FCC Rcd 7797 (OGC, 1999) (“OGC Letter”) (noting that ARS transmitters that “have a built-in capability to operate on CB frequencies and can easily be altered to activate that capability, such as by moving or removing a jumper plug or cutting a single wire” fall within the definition of “CB transmitter”).

¹⁵ OGC Letter.

¹⁶ 47 C.F.R. § 95.603.

12. On March 21, 2006, Mr. Metzger received a Citation for violation of Section 302(b) of the Act and Section 2.803(a)(1) of the Rules, by offering for sale various models of radios that had been tested by OET and found to be non-certified CB transceivers. On June 22, 2006, Mr. Metzger offered for sale a Connex CX 3300HP radio, stated that it could be easily modified to operate on CB frequencies, and offered to make those modifications for a small fee. On June 22, 2006, Mr. Metzger sold, in one financial transaction, the Connex CX 3300HP, a non-certified radio, and modifications, which allowed it to operate on CB frequencies. Therefore, he sold to the agents a non-certified CB transceiver. Even assuming *arguendo*, that Mr. Metzger did not perform the modifications or that the sale and the modifications were performed in separate transactions, Mr. Metzger sold the agents a non-certified radio, which he explicitly claimed could be easily modified to operate on CB frequencies, *i.e.* a non-certified CB transceiver. It is irrelevant that the radio, as manufactured, operated solely on ARS frequencies, because it could be easily modified to operate on CB frequencies. Mr. Metzger was specifically informed of the Commission's Rules defining non-certified CB transceivers in his prior Citation.

13. Finally, Mr. Metzger asserts that the modifications to the radio were not easy to make because they took 15-20 minutes to perform. We disagree. The agents do not know exactly how long it took Mr. Metzger to make the modifications, because they left the store after Mr. Metzger was handed the radio. They returned to the store 15-20 minutes later, so the modifications took no longer than 15-20 minutes. However, even if the modifications took 15-20 minutes, we find that that amount of time does not mean that the modifications were difficult to implement. Mr. Metzger took the radio to the back of the store, removed the outer casing, cut the wire or moved or removed the jumper plug, replaced the casing, and brought it back to the front of the store. Such activities could reasonably take 15-20 minutes.

14. Based on the evidence before us, we find that Mr. Metzger apparently willfully¹⁷ and repeatedly¹⁸ violated Section 302(b) of the Act and Section 2.803(a) of the Rules by offering for sale non-certified CB transmitters on March 21, and June 22, 2006.

15. We have examined Mr. Metzger's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we find no basis for cancellation of the \$7,000 forfeiture proposed for this violation.

IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules, Ben Metzger dba 1 Stop Communications / 1 Stop CB Shop **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of seven thousand dollars (\$7,000) for willfully and repeatedly violating Section 302(b) of the Act and 2.803(a) of the Rules.

17. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the

¹⁷ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful,' ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act" See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

¹⁸ The term "repeated," when used with reference to the commission or omission of any act, "means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." 47 U.S.C. § 312(f)(2).

Act.¹⁹ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.²⁰

18. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Ben Metzger dba 1 Stop Communications / 1 Stop CB Shop at his address of record and to his attorney, Michael C. Olson, 4400 MacArthur Boulevard, Suite 23C, Newport Beach, California 92660.

FEDERAL COMMUNICATIONS COMMISSION

Dennis P. Carlton
Regional Director, South Central Region
Enforcement Bureau

¹⁹ 47 U.S.C. § 504(a).

²⁰ See 47 C.F.R. § 1.1914.